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| APPLICATION NO. | FILING DATE | FIRST NAMED INVENTOR | ATTORNEY DOCKET NO. | CONFIRMATION NO. |
|--|-------------|-----------------------|---------------------|------------------|
| 09/605,001 | 06/27/2000 | Gary Karlin Michelson | 101.0044-04000 | 5171 |
| 22882 | 7590 | 03/14/2006 | EXAMINER | |
| MARTIN & FERRARO, LLP 1557 LAKE O'PINES STREET, NE HARTVILLE, OH 44632 | | | BROWN, MICHAEL A | |
| | | | ART UNIT | PAPER NUMBER |

3764

DATE MAILED: 03/14/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

| | | | |
|------------------------------|--------------------------------------|---|--|
| Office Action Summary | Application No. 09/605,001 | Applicant(s) MICHELSON, GARY KARLIN | |
| | Examiner Michael Brown | Art Unit 3764 | |

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 29 November 2005.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 105-129 is/are pending in the application.
 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☒ Claim(s) 105-120 is/are allowed.
- 6) ☒ Claim(s) 121-129 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
 Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
 Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
 a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|---|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) Paper No(s)/Mail Date <u>11-29-05</u> . | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Claim Rejections - 35 USC § 112

Claims 125-127 and 129 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention. The original specification doesn't provide support for the retractor arms being "stationary". Thus, the word stationary is new matter.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 121-129 are rejected under 35 U.S.C. 102(b) as being anticipated by Brantigan '915.

Brantigan discloses in figure 4 a surgical retractor (the device is used to retract bone from the spine) for use in distracting adjacent vertebrae, the retractor comprising an elongated sleeve 22, having a longitudinal passageway (the opening that the drill pass through), first and second retractor arms 23 that define a first and second vertebra support surfaces (fig. 4), each retractor arm being spaced apart a predetermined distance (fig. 4).

Brantigan discloses in figure 4 a method of using a surgical retractor comprising the method step of providing a surgical retractor including a sleeve 22, defining an opening therethrough (the opening that the drill passes through), inserting an instrumentation 21 through the opening and performing a spinal surgical procedure (move bone from the spine to insert a bone plug). The elongated sleeve includes two retractor arms 23 configured for insertion at least partially into the intervertebral space between opposed vertebrae (fig. 4).

Allowable Subject Matter

Claims 105-120 are allowed.

Response to Arguments

Applicant's arguments filed November 29, 2005 have been fully considered but they are not persuasive. Applicant argues that the 112 first paragraph rejection on new matter (the retractor arms being stationary) is transverse. Applicant argues that the outer sleeve is of a fixed length and rigid. Thus, making the retractor arm stationary. However, because the outer sleeve is a fixed length and rigid doesn't necessarily mean it is stationary. In other words, an object can be rigid and fixed but that doesn't mean that it is stationary. Applicant argues that the teeth of the drill guide disclosed by Brantigan '915 don't have first and second support surfaces adapted to contact first and second vertebrae. However, Brantigan discloses a drill guide having teeth that have first and second surfaces. These two surfaces are capable of contacting first and second vertebrae. The word adapted means that the surfaces are not contacting the first and second vertebrae, but are capable of contacting the first and second seconds.

In order for the first and second surfaces of the teeth to read on first and second surfaces of claim 121, the two surfaces have to only be are capable of contacting first and second vertebrae. Applicant argues that Brantigan does teach or suggest distracting adjacent vertebrae. However, the examiner is interpreting adjacent vertebrae to be one of the vertebrae or both vertebrae. Clearly Brantigan discloses removing a vertebrae that is adjacent to a vertebrae. Applicant argues that the teeth as taught by Brantigan don't have surfaces sufficient to distract opposing tissue portions. However, since the teeth are inserted into the tissue a portion of vertebrae when they are removed there will be tissue on the surface of the teeth. Also the teeth are inserted into the vertebrae a depth that will allow the drill to remove tissue from the patient's back.

Conclusion

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the mailing date of this final action.

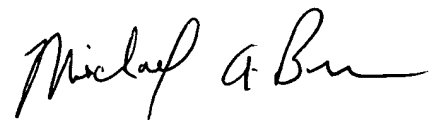
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Any inquiry concerning this communication or earlier communications from the examiner should be directed to Michael Brown whose telephone number is 571-272-4972. The examiner can normally be reached on 5:30 am-4:00 pm Monday-Thursday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Gergory Huson can be reached on 571-272-4887. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

M. Brown
March 6, 2006

A handwritten signature in black ink, appearing to read "Michael A. Brown". The signature is fluid and cursive, with the first name "Michael" being more prominent than the last name "Brown".

MICHAEL A. BROWN
PRIMARY EXAMINER